
In the Matter of:

**MONTANA HUMAN RIGHTS
COMMISSION**

Appellant

Cooperative Agreement FF208K888002

HUDBCA No. 90-5305-C8

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RULING ON GOVERNMENT'S MOTION TO DISMISS

Opinion by Administrative Judge David T. Anderson

May 16, 1991

Counsel for the U.S. Department of Housing and Urban Development ("HUD," "Government" or "Department") has filed a Motion to Dismiss for lack of jurisdiction in this appeal filed by the Montana Human Rights Commission ("Appellant" or "MHRC"). For the reasons set forth below, the Government's motion to dismiss is granted.

Statement of the Case

On May 17, 1982, HUD and MHRC, a government agency of the State of Montana, executed a Memorandum of Understanding ("MOU"). The purpose of this MOU was to provide cooperation and coordination between state and federal agencies to eliminate duplicative enforcement activity in the processing of housing discrimination complaints filed under Title VIII of the Civil Rights Act of 1968 ("Title VIII"), 42 U.S.C. § 3601 et seq., or filed under the Montana Human Rights Act, a federal and state statute, respectively, which have been determined to

be substantially equivalent. (Govt. Exh. J, at 2). The MOU specifies that MHRC and HUD wish "to provide for the efficient processing of housing discrimination complaints subject to their concurrent jurisdiction [under certain provisions of the Montana Human Rights Act and Section 810(c) of Title VIII respectively], and other related areas of cooperation." Id. In essence, where housing discrimination complaints arise under the jurisdiction of both HUD and MHRC, each agency would be mutually responsible for efficiently processing these complaints through worksharing and information exchange.

HUD's Office of Fair Housing and Equal Opportunity ("FHEO") and MHRC executed Cooperative Agreement No. FF208K888002 on April 26, 1988. This agreement provides that:

A. General Requirements

The [R]ecipient [MHRC] agrees to process complaints arising within its jurisdiction and/or augment its fair housing enforcement efforts by engaging in outreach, education, training and technical assistance pursuant to the Memorandum of Understanding. The Recipient agrees to cooperate with HUD in the handling of housing discrimination complaints under Title VIII of the Civil Rights Act of 1968, as amended, and the fair housing law enforced by the Recipient in accordance with the Memorandum of Understanding

B. Training

Subject to HUD sponsorship of training sessions in sufficient geographical proximity to permit the Recipient to meet the following obligations, the Recipient agrees to enroll a minimum of 5 employees in training sponsored by the Department. (Govt. Exh. A, p. 21).

A "Disputes" paragraph is included in the Cooperative Agreement, which provides:

During performance of the instrument, disagreements may arise between the recipient and the G/CAO [Grant/Cooperative Agreement Officer] on various issues, such as the allowability of costs. If a dispute concerning a question of fact arises, the G/CAO shall prepare a final decision, taking into account all facts and documentation presented. The decision shall be mailed to the recipient. The recipient may appeal the decision within thirty (30) days to the Director, Office of Procurement and Contracts. (Id. at 20, para. 15).

By letter dated January 4, 1990, MHRC filed an appeal with Vito Vollero, Director of the Office of Procurement and Contracts, after Lloyd Miller, Regional Director of FHEO, denied MHRC's claim for training costs in the amount of \$800 under the

Cooperative Agreement. In a letter dated January 29, 1990, however, Vollero advised MHRC that its appeal should be filed with the "HUD Regional Administration" instead of with the Office of Procurement and Contracts. MHRC, nevertheless, sent a letter dated February 27, 1990 to Miller seeking reconsideration of his earlier decision. MHRC also filed an appeal with the HUD Board of Contract Appeals on March 13, 1990.

By letter dated March 26, 1990, Miller informed MHRC that, under the Department's Fair Housing Assistance Program guidelines, MHRC's appeal had to be filed with Gordon Mansfield, Assistant Secretary for FHEO, rather than with the HUD Regional Administration. This instruction contradicted the advice Vollero had given to MHRC in his letter dated January 29, 1990. Miller's letter cites Paragraph 4-11 of Fair Housing Assistance Program Handbook No. 8022.1 as support for this change:

Each Cooperative Agreement contains a Disputes provision. If a dispute arises, that is strictly a program matter, that dispute will be resolved at the program office level. However, any dispute concerning a question of fact arising under the terms and conditions of the Cooperative Agreement will be decided by the G/CAO (Grant Cooperative Agreement Officer) in writing. The recipient may appeal the G/CAO's decision to the Assistant Secretary for FHEO.

MHRC then filed an appeal with FHEO Assistant Secretary Mansfield who issued a decision on May 17, 1990 which denied MHRC's claim.

Discussion

The singular issue in this case is whether this Board has jurisdiction to decide a dispute arising from a Cooperative Agreement executed under the Fair Housing Act, at 42 U.S.C. § 3601 et seq. and the Department's Fair Housing Assistance Program, at 24 C.F.R. § 111. The purpose of this Program is:

to build a coordinated intergovernmental enforcement effort to further fair housing and encourage States and localities to assume a greater share of the responsibility for administering their fair housing laws. 24 C.F.R. § 111.103

To be eligible for funding under 24 C.F.R. § 111.107, a state agency must:

- (1) enforce laws substantially equivalent to Title VIII Civil Rights Act,
- (2) execute a Memorandum of Understanding (MOU) with HUD,
- (3) participate in HUD-sponsored training.

It is uncontested that MHRC has met these procedural requirements and was eligible for financial and support assistance from HUD for the administration of state fair housing laws.

This Board derives its jurisdiction to resolve contract disputes from the provisions of the Contract Disputes Act of 1978 ("CDA"). 41 U.S.C. § 601 et seq. This Board also has the authority to decide other matters which are assigned to it by the Secretary of HUD under 24 C.F.R. § 20.4. However, there has been no Secretarial delegation of authority for the Board to hear and decide the present action. Nor does the disputes clause in the Cooperative Agreement before us provide that an appeal shall be decided by this Board.

The Contract Disputes Act, at 41 U.S.C. § 602(a), provides in relevant part:

Unless otherwise specifically provided herein, this Act applies to any express or implied contract . . . entered into by an executive agency for -

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair or maintenance of real property; or
- (4) the disposal of real property.

Appellant argues that the Agreement entered into by HUD and MHRC is, in effect, a procurement contract for services within the purview of the CDA, despite its Cooperative Agreement appellation. The Government, however, contends that the Board has no jurisdiction over this matter because the parties entered a cooperative agreement under the Federal Grant and Cooperative Agreement Act, an agreement which is not a procurement contract within the ambit of the CDA.

The Federal Grant and Cooperative Agreement Act, at 31 U.S.C. § 6303, provides that a procurement contract is to be used when:

1. the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; or
2. the agency decides in a specific instance that the use of a procurement contract is appropriate. (emphasis supplied).

A cooperative agreement is to be used when:

1. The principal purpose is to transfer a thing of value to the State, local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease or barter) property or services for the direct benefit or use of the United States Government; and
2. Substantial involvement is expected between the executive agency and the State, local government or other recipient when carrying out the activity contemplated in the agreement. 31 U.S.C. § 6305 (emphasis supplied).

It is indisputable that HUD's "principal purpose" in entering into the agreement with MHRC was to provide financial and training assistance to MHRC so that MHRC could process discrimination complaints arising under Montana's fair housing laws. Any benefit accruing to HUD would be indirect, e.g., the benefit of information sharing where the handling of certain anti-discriminatory actions undertaken by the State of Montana coincided with similar enforcement actions by HUD based on federal Title VIII violations. A cooperative agreement is to be used if the primary purpose, as it is here, is to provide assistance to a non-federal entity in serving a public purpose as compared to serving the immediate needs of, or being of direct benefit to, the federal government. The satisfaction of such an immediate need, or the provision of a direct benefit to HUD, would require HUD to enter into a procurement contract. 67 Comp. Gen. 13 (1987). That does not appear to be the case here.

Substantial involvement was expected between HUD and MHRC during the performance of the Cooperative Agreement. The use of a cooperative agreement is proper where there is a federal program or administrative assistance, federal and recipient collaboration, or where federal monitoring is desirable during work performance. See S. Rep. No. 95-449, 95th Cong., 2d Sess. (Federal Grant and Cooperative Agreement Act of 1978), reprinted in 2 U.S. Code Cong. & Ad. News 11, 19.¹ Here, there is collaboration between HUD and MHRC in the processing of housing discrimination complaints, administrative assistance by HUD to help develop a state process for resolving complaints,

¹ P.L. 95-224 (1978) was not substantially changed by P.L. 97- 258 (1982) (at 31 U.S.C. §3601 et seq.). Therefore the legislative history of the 1977 Act offers relevant guidance.

and HUD's monitoring of MHRC's performance to ensure that complaints are properly processed.

A federal agency has broad flexibility and clear discretion in determining whether a transaction is procurement or assistance in nature when it creates a relationship with a non-federal entity by executing a written instrument. 61 Comp. Gen. 428 (1982). The way the agency classifies a transaction is a public statement of how the agency views its mission, its responsibilities, and its relationship with the non-federal sector. S. Rep. No. 95-449, supra, at 20. Generally, the agency's exercise of its discretion will not be questioned unless there is: (1) an apparent conflict of interest; (2) a showing that an agency is using a cooperative agreement to avoid statutory and regulatory requirements for competition that would apply to a procurement; or (3) no independent statutory authority beyond that afforded by the Federal Grant and Cooperative Agreement Act to award cooperative agreements. 61 Comp. Gen. 637 (1982).

In the present case, there is no evidence that HUD has a conflicting interest, which would result in an impropriety in entering into a cooperative agreement with MHRC. Nor is there evidence that HUD used a cooperative agreement to avoid competition requirements. HUD executed this Cooperative Agreement under the statutory and regulatory authority of the Fair Housing Act, the Department's Fair Housing Assistance Program, and the Federal Grant and Cooperative Agreement Act. HUD followed the purpose and procedural requirements specified under the Fair Housing Assistance Program in that HUD and MHRC first entered into a MOU, which set forth the parameters of an understanding of cooperation and coordination, six years before entering into the Cooperative Agreement. In view of these considerations, we cannot find, based upon the record before us, that the subject Cooperative Agreement is a procurement contract.

Conclusion

As the Cooperative Agreement in this case is not a contract within the purview of the CDA, we conclude that this Board has no jurisdiction under the CDA to resolve this dispute between HUD and MHRC. See Kurtis R. Mayer and Pamela Mayer, HUDCA No. 83-823-C20, 84-2 BCA ¶ 17,494. We, therefore, grant the Government's motion to dismiss. This appeal is dismissed for want of jurisdiction.

David T. Anderson
Administrative Judge

Concur:

Jean S. Cooper
Administrative Judge

Timothy J. Greszko
Administrative Judge